No. ~~1178~~ 87

IN THE

Supreme Court of the United States

October Term, 1969

UNITED STATES
Petitioner

VERSUS

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

AMICUS CURIAE BRIEF FOR THE STATE OF OKLAHOMA

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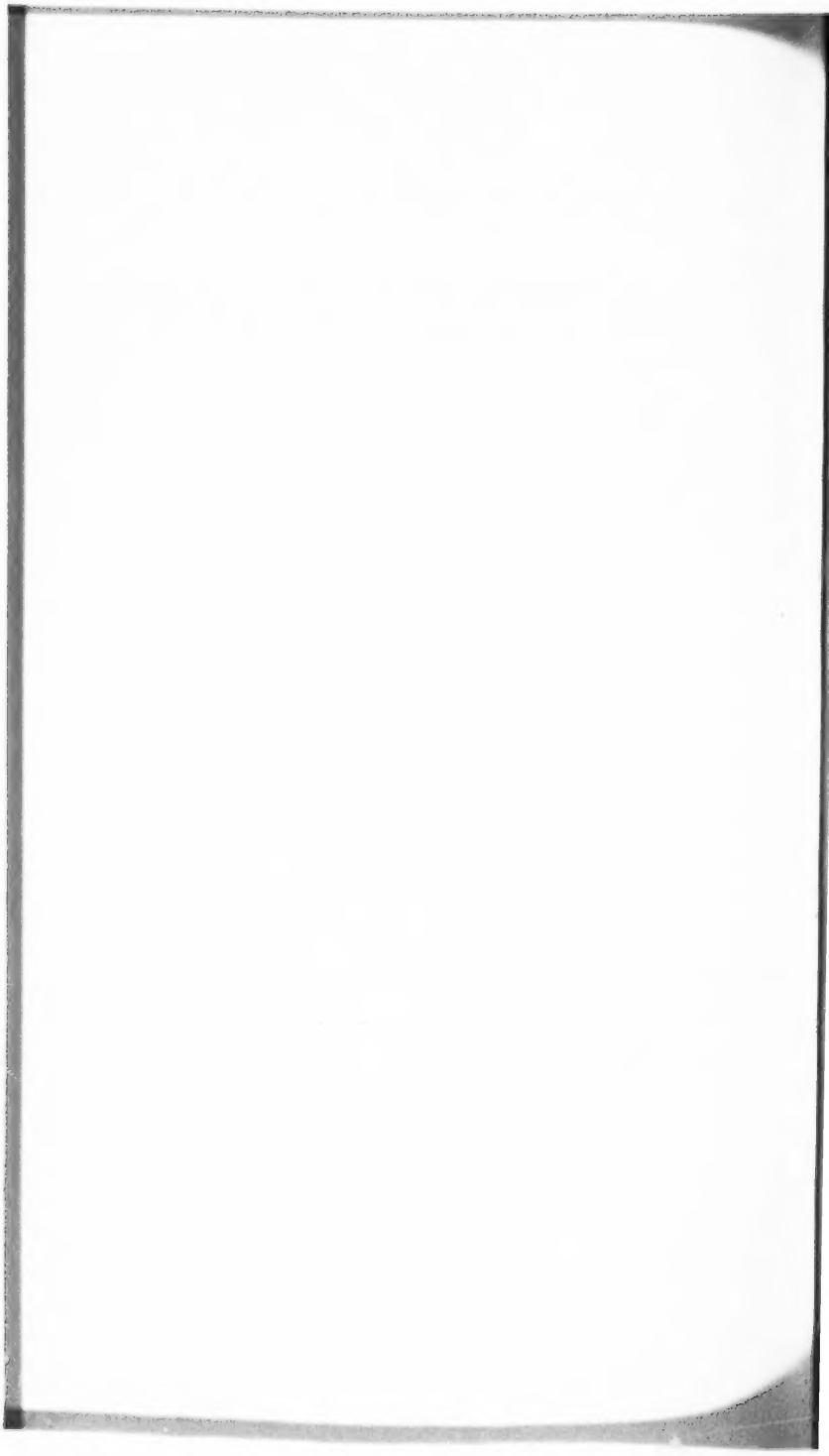

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INTEREST OF AMICUS CURIAE

The State of Oklahoma is essentially an appropriation state with respect to water adjudication. 82 O.S. Supp. 1969, § I-A. In determining water rights within its borders the State is faced with the problem that the United States asserts certain water rights based upon the doctrine of reserved rights. Such being the case, all deter-

minations of water rights made concerning river systems in which the United States claims reserved rights, are subject to such reserved rights. This leads to confusion and uncertainty as concerns the water rights in such river systems. Therefore, it is believed that there should be some method through which the state can force the United States into some forum in order to determine the extent of the rights the United States has in such river system. The State of Oklahoma therefore has an interest in the question of whether or not 43 U.S.C. § 666 consents to suit against the United States in situations where the United States claims water rights under the doctrine of reserved rights.

ARGUMENT

I.

BY VIRTUE OF TITLE 43 U.S.C. § 666 THE UNITED STATES HAS CONSENTED TO SUITS AGAINST IT IN CASES WHERE THE UNITED STATES CLAIMS WATER RIGHTS UNDER THE DOCTRINE OF RESERVED RIGHTS.

The United States has considerable claims to the nation's water resources. Many of these claims are based upon the doctrine of "reserved rights", which is to the effect that the United States is entitled to use as much water from sources of land withdrawn from the public domain as is necessary to fulfill the purposes

for which the lands were withdrawn, subject only to water rights vested as of the date of withdrawal. *Arizona v. California*, 298 U.S. 558, 56 S.Ct. 848, 80 L.Ed. 1331 (1936).

Furthermore, the State of Oklahoma has a great interest in the administration and determination of water rights within its borders, as do the other Western States. In areas where the United States asserts some "reserved rights", any rights determined by the State will always be indefinite because they will be subject to the "reserved rights" in the United States. In this regard the Colorado Supreme Court stated:

> "We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree of permit and which therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure — and this is equally true from the standpoint of the United States as well as Colorado and its citizenery." United States v. District Court In and For Co. of Eagle, 458 P. 2d 760, 772 (1969).

Therefore, in such situations there is a definite need for the state to be able to force the United States into some forum for the purpose of determining exactly what rights the United States has in the waters in question. Title 43 U.S.C. § 666, supra, can be construed as authorizing suit against the United States in such situations.

This section, commonly referred to as the McCarran Amendment, provides in part as follows:

> "(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: PROVIDED, That no judgment for costs shall be entered against the United States in any such suit.
>
> "(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."

It is submitted that the use of the term "or otherwise" in the above statute extends its application to situations wherein the United States claims water rights based upon the doctrine of "reserved rights". Such a construction can be supported by certain aspects of the legislative history of the Act.

Prior to the passage of the Act the Acting Assistant

Secretary of the Interior wrote a letter to Senator McCarran. In that letter he expressed opposition to the bill, and recommended that it be changed in order to make it clear that the Act gave no consent for adjudication of rights other than those acquired under State law. The changes were not made and the bill passed as it stood at the time of the letter. See Comment, Adjudication of Water Rights Claimed by the United States — Application of Common-Law Remedies and the McCarran Amendment of 1952, 48 Calif. L. Rev. 94, 112 (1960); and the opinion of the Colorado Supreme Court below, 458 P. 2d 760, at 773. Such would warrant a finding that the intent behind the Act was to consent to suits against the United States in situations where the United States claims water rights under the doctrine of "reserved rights."

It is true that the doctrine of *ejusdem generis* could be applied for the purpose of arriving at a different result. However, it is submitted that the doctrine may not be used to defeat the obvious purpose of legislation. *Gooch v. United States*, 297 U.S. 124, 56 S.Ct. 395, 80 L.Ed. 2d 522 (1936).

Therefore, it is submitted that the Supreme Court of the State of Colorado did not err when it held, at 458 P. 2d 760, 773, as follows:

> "For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment

that it be used to obtain jurisdiction over the United States with respect to its reserved water rights."

CONCLUSION

The State of Oklahoma respectfully submits that the holding of the Supreme Court of the State of Colorado, to the effect that 43 U.S.C. § 666 consent to suit against the United States with respect to its reserved water rights, be affirmed.

Respectfully submitted,

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